Supreme Court of the United States

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 20, 1948

INDEX AND SUMMARY OF CONTENTIONS

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C. The heated debate on the Jennings Bill in the House just 10 days after the passage of the revision without any reference therein to Section 1404(a) demonstrates a total absence of Congressional intent to make Federal Employers' Liability Act cases transferable.

D. A contraction of employees' rights under the Federal Employers Liability Act would reverse long-term Congressional trends.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The Generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it

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IN THE

Supreme Court of the United States

October Term, 1948

No. 233—Miscellaneous

Summary Docket

JESSIE A. KILPATRICK,

Petitioner,

—against—

THE TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION, SUPPLEMENTING SUMMARY CONTENTIONS IN ORIGINAL BRIEF DATED NOVEMBER 23, 1948

Statutes Involved

Section 6 of the Federal Employers' Liability Act (as amended in 1910—45 U. S. C. A. 56), in relevant part provides:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of-

the courts of the several States; and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Section 1404(a) of the revised Judicial Code, effective September 1, 1948 (28 U. S. C. A. 1404(a)), provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been tried."

Issue Involved

The narrow issue involved on the merits is whether or not the revised Judicial Code (28 U. S. C. A. 1404(a)) empowers a District Judge to transfer an action brought under the Federal Employers' Liability Act (45 U. S. C. A. 51-56).

POINT I

It was completely settled prior to the enactment of the revised Judicial Code that the choice of venue under the Federal Employers' Liability Act was not subject to discretionary impairments by the courts.

The present special venue provision of the Federal Employers' Liability Act[1] was passed by an amendatory act of Congress on April 5, 1910 and gave an unqualified choice to an injured railroad worker to select as the venue for the prosecution of the remedy which the Act established for him, any district where the defendant was doing busi-

1 45 U. S. C. A. 56.

ness at the time of the commencement of the action. After 38 years of embittered litigation in both Federal and State courts, an interpretation of this special venue provision as being of the essence of that remedy and of the general humanitarian purposes thereof, was accomplished and became well settled.

The judicial awareness of the inviolability of this choice became so well crystallized that contemporary courts have spoken of the choice of venue afforded to the injured workman as a "substantive right".[2]

The minimal conclusion that may be drawn from the decisions of this Court is that the choice of venue given an injured railroad employee was purposeful and not subject to debilitation by the exercise of discretionary judicial powers.

Baltimore & Ohio R. Co. v. *Kepner* (1941), 314 U. S. 44;

Miles v. *Illinois Central R. R. Co.* (1942), 315 U. S. 698;

Gulf Oil Corporation v. *Gilbert* (1947), 330 U. S. 501, 503;

Kilpatrick and Parker v. *Texas & Pacific Railway Co.* (1948); 166 F. (2d) 788, cert. den. October 11, 1948.

In the *Kepner* case, *supra*, the Court was faced with what would be in ordinary litigation a vexatious and un-

2 *Akerly* v. *New York Central R. R. Co.*, C. A. 6th Circuit, 168 F. (2d) 812, 814 (1948).

Fleming v. *Husted* (1946), 68 F. Supp. 900, D. C., S. D. of Iowa.

Compare with *Sheridan* v. *Pere Marquette Ry.* (1945), 62 F. Supp. 590, in which the Court refers to the choice of venue as an "adjective right" (page 593) but adds: "The beneficial effects of the statute should not be whittled away by the courts by distinguishing between adjective and substantive rights", and states that adjective rights are frequently as important as substantive rights.

conscionable choice of venue, plus a power in the court below to exercise discretion. The Court said (page 51):

> "Under such circumstances, petitioner asserts power, abstractly speaking, in the Ohio Court to prevent a resident under its jurisdiction from doing inequity. Such power does exist."

This Court said further, however, that the grant of the venue privilege by Congress could only be diminished by Congress, as distinguished from the courts, and in the same manner as it had been previously established, *viz*: by the amendment to Section 6 of the Federal Employers' Liability Act of April 5, 1910.

From *Miles* v. *Illinois Central R. R. Co., supra,* we single out the lucid rationale of the considerations which may very well have motivated Congress in granting to the injured railroad employee such wide selectivity in choosing venue.[3]

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3 "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal or a state court of which to ask his remedy. There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege, as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic, and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts, and to get to those thought to be generous; to escape courts whose procedures are burdensome to the plaintiff, and to seek out courts whose procedures make the going easy.

That such a privilege puts a burden on interstate commerce may well be admitted, but Congress has the power to burden. The Federal Employers' Liability Act itself leaves interstate commerce under the burden of a medieval system of compensating the injured railroad worker or his survivors. He is not given a remedy, but only a lawsuit. It is well understood that in most cases he will be unable to pursue that except

We do not deem it material whether the Congress in 1910 adequately perceived the full extent of the utility to the injured railroadman of the choice of venue as discussed in Mr. Justice Jackson's separate concurring opinion. While his analysis is valuable for its realism and accuracy and its appraisal of the social desirability of permitting the broad choice of venue, its true importance here is that it furnishes a bill of particulars on the finding implicit in the majority opinions in *Kepner* and *Miles* that the grant of venue rights was a purposeful exercise of the legislative prerogative by Congress.

There is no distinction in legal contemplation between a judicial interference with the choice of venue based upon the ground that the choice of venue is generally unconscionable and inequitable, that it would constitute an undue burden on interstate commerce or upon the ground that it is violative of the doctrine of *forum non conveniens*.

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by splitting his speculative prospects with a lawyer. The functioning of this backward system of dealing with industrial accidents in interstate commerce burdens it with perhaps two dollars of judgment for every dollar that actually reaches those who have been damaged, and it leaves the burden of many injuries to be borne by them utterly uncompensated. Such being the major burden under which the workmen and the industry must function, I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in favor of the workman in the matter of venue.

"It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere. This latter would be a frequent result if we upheld the contention made in this case and in the *Kepner* case. I think, therefore, that the petitioner had a right to resort to the Missouri court under the circumstances of this case for her remedy."

JACKSON, J.

Miles v. *Illinois Central R. R. Co.*, 315 U. S. 698, 706.

That this Court is of like mind is apparent from the majority opinion in *Gulf Oil Corporation v. Gilbert*[4] and from the denial of certiorari to the Second Circuit in the *Kilpatrick* case, in which the Court of Appeals had said that any considerations of *forum non conveniens* were unconditionally eliminated from Section 6 (of the Federal Employers' Liability Act).[5]

Nor do we perceive any difference for the purpose of construing legislative intent in the light of the decisions of the Supreme Court, whether the mechanics of the impediments thrust at the choice of venue by a District Judge are dismissals or transfers. If in fact the choice of venue filled the entire field and cannot be frustrated for reasons of convenience or expense, it makes no difference whether the frustration is accomplished via a dismissal or transfer.

In 1948, at the time when Congress enacted the Judicial Code, there was a well established recognition in the courts that the grant of privilege of choosing venue in Federal Employers' Liability Act cases was purposefully benign toward the injured workman and not subject to impairment, impediment or disturbance by the exercise of conflicting inherent judicial powers.

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4 *Supra*, 505.

5 *Supra*, 790.

6 Of Section 1404(a) of the New Judicial Code (28 U. S. C. A. 1404(a)).

POINT II

The general purposes of the revision of the Judicial Code militate against a construction that Congress intended therein to empower District Judges to emasculate the right to choose venue, which it had previously conferred upon injured railroad men.

Section 1404(a) of the Judicial Code, by which the district judge believed he had been empowered to frustrate the venue selection made by the plaintiff below, became law as the result of the revision of the Judicial Code, and it is therefore pertinent to examine the nature of the enactment accomplishing that revision and its legislative history, with a view toward ascertaining if there be any feature thereof which would lend credence to the assumption of such a Congressional intent. We find nothing but evidence to the contrary.

Other than revision and codification, the major purpose of the enactment was to make Title 28 actual law rather than merely *prima facie* evidence thereof. The enactment itself is an act to "revise, codify and enact into law Title 28 of the United States Code".[7]

The general intendment of the revision was given detailed clarification in House Report 308 of the 80th Congress, First Session,[8] by which Congress was told:

> "Revision, as distinguished from codification, required the substitution of plain language for awkward terms, reconciliation of conflicting laws, repeal of superseded sections, and the consolidation of related provisions."

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7 Chapt 646, Public Law 773, approved June 25, 1948, effective September 1, 1948.

8 United States Code, Congressional Service, Title 28, page 1693.

Obviously, there was no necessity for a "revision" of the venue provision of the Federal Employers' Liability Act on that basis.

The report continues and discusses venue changes in such a manner as to clearly negate in the mind of a Congressman, had such question arisen, that there was an intention to make vulnerable the choice of venue as provided in the Federal Employers' Liability Act. The report stated:[9]

> "So also, minor changes were made in the provisions regulating the venue of district courts, in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391 to 1406."

What Congress had authorized and believed it was passing upon was an expert revision and recodification;[10] the court below attributes to the panel of expert revisers hired for that purpose, an expropriation of authority clearly not given them to make changes in the highly controversial field of private rights between railroads and injured railroad employees.

The law enacting the revision was presented to both the House[11] and Senate[12] via the consent calendar; rules were suspended and the Bill passed practically without debate[12a]

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9 *Id.*, page 1697.

10 House Resolution 388, introduced October 5, 1939; "Revision of the Federal Judicial Code", Vol. 48 Law Notes p. 11; House Report 308, 80th Congress, 1st Session, United States Code Congressional Service, Title 28, p. 1695; Report of Attorney General Clark, *id.* p. 1699.

11 House Resolution 3214, passed July 7, 1947.

12 Passed on June 12, 1948.

12a The sole controversy centered about Tax Court provisions which were thereupon eliminated from the revision.

and without opposition. The reported comment of Congressmen indicate an intention not to legislate in any controversial fields. Senator Donnell, in presenting the Bill to the Senate, said:[13]

> "The purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the Committee to be of substantial (sic) and non-controversial nature."

The counsel for the House Committee on the Revision of the Laws, Charles J. Zinn, Esq., testified before the Sub-Committee of the House Judicial Committee on March 7, 1947. He said:[14]

> "People who are afraid that we are changing the law to a great extent need not worry particularly about it."

Congressman Keogh, Chairman of the Committee originally in charge of the Bill, said at that time:[15]

> "The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing company as well as the employees of the Committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law.[16] * * * We proceeded upon

13 United States Code Congressional Service, Title 28, p. 2020.

14 *Id.*, page 1981.

15 *Id.*, page 1945.

16 *Id.*, page 1950.

> the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law."[17]

The Senate Report emphasized the non-controversiality of the revision. It said:[18]

> "Many non-controversial improvements have been affected * * *. At the same time, great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval."

In spite of the general nature of the legislation and in disregard of the limitations on the responsibilities and even the authority of the expert revisers, and oblivious to the record representations to Congress that the changes in the Code were non-controversial, it is nevertheless asserted that a Congressional intent to affect Federal Employers' Liability Act cases can be spelled from the fact that appended to the proposed legislation, which itself consisted of some 2,681 sections, there were revisers' notes and that in the revisers' note to Section 1404(a), a Federal Employers' Liability Act case is referred to as an illustration of the need for such a provision.

In the Congressional Service pamphlet, to which footnote references have been made herein, the Reviser's Notes themselves occupy some 236 printed pages as compared with the 152 pages of the actual Code.

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17 *Id.*, page 1950.

18 Senate Report 1559, 80th Congress, *id.*, page 1676.

The fallaciousness of extracting a Congressional intent from *such* revisers' notes is underscored by the comment of Congressman Robsion, the Chairman of the Committee, when he testified at the hearing on the legislation conducted by Sub-Committee 1 of the House Judiciary Committee on the Revision:[19]

> "You can never reach a time when the members of Congress will read a bill like that and then turn to all the hundreds and hundreds of references, the various statutes, to see whether they are correct or have been repealed, and perhaps we will not get many of them to read H. R 2055[20] which contains over 170 pages."

Congressman Devitt, a member of the Committee testifying at the same hearing, said:[21]

> "I emphasize the professional standing and ability of the authors of this work because I know it is not humanly possible for the members to read every word or even every section of the bill and that of necessity great reliance must be placed upon the integrity and caliber of the persons who did the work."

If Congressmen in passing on an expert revision of this character are not expected to read carefully the actual enactment of length 152 pages, is it not a *reductio ad absurdem* to charge them with having read the 236 pages of revisers' notes which accompanied the legislation?

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19 *Id.*, page 1941.

20 Supplanted by H. R. 3214.

21 United States Code Congressional Service, Title 28, page 1942.

Even if there be a grant that this revisers' note should be singled out for judicial examination the note must, if it is to be ascribed even the least importance, contain a clear and unambiguous statement of the intention of the revisers. But the revisers' note does not state that Section 1404(a) applies to Federal Employers' Liability Act cases. The reference to the *Kepner* case in the revisers' note is capable of an entirely different construction; a construction far more consistent with what one would anticipate the intendment of the revisers to be in their character as a group of expert draftsmen, to wit:

In Chapter 87 of the revision, of which Section 1404(a) is a part, the revisers had compiled numerous venue provisions, all except that in Section 1391 being of the "special" variety. Mr. Justice Frankfurter had pointed out in his dissent to *Kepner*[22] that there is nothing to distinguish literally a special venue provision from a general venue provision. Two judges of this Court had concurred with that dissenting view. Having redrafted these numerous "special" venue provisions the revisers may have feared that, without more, it was within the realm of possibility for the courts on the authority of the *Kepner* precedent to construe each enactment as having filled the entire field of venue in whatever particular classification of litigation was involved, and that the courts had thereby been deprived of their inherent equitable powers to invoke the doctrine of *forum non conveniens* or apply other inherent equitable powers to the venue choice. The revisers therefore may have believed as draftsmen that there was the need, if the doctrine of *forum non conveniens* was to be preserved, to incorporate in Chapter 87, along with the numerous "special" venue provisions, the "saving" pro-

22 314 U. S. 44, 62.

vision that in those cases the doctrine of *forum non conveniens* could be applied and the cases transferred.[23]

It is the far more credible and consistent view that the revisers, in selecting *Baltimore & Ohio* v. *Kepner* as the illustration of the need for such a provision, were thinking in terms of draftsmanship rather than the equities between railroads and their injured employees.

We submit that the ambiguity of the revisers' note is sufficiently patent, particularly when considered in the context in which it was presented to Congress, to bar the assertion that it represents any evidence of an intention to render illusory the right to choose venue in Federal Employers' Liability Act cases. The evidence afforded by the reports to the House and Senate, as well as the general purpose of the statute itself, strongly suggest that there was no Congressional intent to disturb those fields of litigation where, in the delicate adjustments of rights and liabilities, the choice of venue represented a valuable and pivotal point of balance.

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23 The history of the revisers' note bears out this thesis since it was prepared prior to October 30, 1945 and has been unchanged ever since the preliminary draft of the revision was originally sent to the Sub-Committee of the House by the Committee's counsel, Mr. Zinn, under date of October 30, 1945. The Court will recall, of course, that *Gulf Oil Corporation* v. *Gilbert*, *supra*, was not decided until 1947.

POINT III

By the use of the words "any civil action" in Section 1404(a) there was intended any civil action referred to in Chapter 87 of Title 28.

Chapter 87 of the revised Judicial Code is entitled: "District Courts; Venue". In this chapter, following the general venue provision,[24] there are assembled special venue provisions covering "banking association actions against the Controller of currency",[25] "proceedings to recover fines, penalties or forfeitures",[26] "recovery of Internal Revenue taxes",[27] "interpleader",[28] "enforcement of Interstate Commerce Commission orders",[29] "partition actions involving the United States",[30] "patents and copyrights",[31] "stockholders derivative actions",[32] "Federal Tort Claims Act cases",[33] and "condemnation proceedings".[34]

The combination of words "any civil action", by actual count, appear in Chapter 87 prior to its use in Section 1404(a), on 13 occasions. Where used in Chapter 87 prior to its use in Section 1404(a) it is modified. As illustrations: "any civil action by a national banking association" (1394), "any civil action for the collection of Internal Revenue taxes" (1396), "any civil action of interpleader" (1397), "any civil action for patent infringement" (1400); etc.

24 28 U. S. C. A. 1391.
25 *Id.*, 1394.
26 *Id.*, 1395.
27 *Id.*, 1396.
28 *Id.*, 1397.
29 *Id.*, 1398.
30 *Id.*, 1399.
31 *Id.*, 1400.
32 *Id.*, 1401.
33 *Id.*, 1402.
34 *Id.*, 1403.

etc. Section 1404(a), however, simply reads that a district court may transfer "any civil action" without modification.

Under these circumstances, it is imprudent to ascribe extraordinary significance to the use of the words "any civil action". The use of the words "any civil action" in the context found here is at best ambiguous and unclear. The ambiguity is resolved by the application of elementary presumptions of statutory construction.

Although the term "any civil action" is, of course, broad enough to include Federal Employers' Liability Act cases, it is to be construed as having no application or effect upon a special enactment. The special enactment is deemed to be an exception to the general provision.

> "Where there are two statutes, upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatability, that the special is intended to remain in force as an exception to the general. (*Townsend* v. *Little*, 109 U. S. 504, 512; *Ex Parte Crow Dog*, *id.* 556, 570; *Rogers* v. *Texas*, 185 U. S. 83, 87-89.)"[35]

We submit that the venue provisions which are reenacted in Chapter 87 are all of the civil actions in which the Court is empowered to apply the doctrine of *forum non conveniens*. We believe that the few omissions were purposeful. Beside the Federal Employers' Liability Act, the venue provision under the Anti-Trust Laws is excluded. There is no re-enactment of the venue provision of the Bankruptcy Law, but in that law itself there is contained a provision for transfer of proceedings on the ground of *forum non conveniens*.[36]

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35. *Washington* v. *Miller*, 235 U. S. 422, 428 (1914).

36. 11 U. S. C. A. 518.

POINT IV

The District Judge ignored the known temper of Legislative Opinion and Congressional action on the Jennings Bill underscored the absence of Congressional intent to affect venue under the Federal Employers' Liability Act by enacting the revision of the Judicial Code.

> "Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion."[36a]

While there may be an area for disagreement in the minds of reasonable men as to the ultimate conclusions which may be drawn from the fact that the Jennings Bill,[37] which sought to restrict the choice of venue in Federal Employers' Liability Act cases, passed the House in the 80th Congress but did not reach the floor in the Senate, the record debate and literature on this proposal demonstrably establish that the subject matter was provocative of a vast plethora of divergent and mutually exclusive views.[38]

36a Some Reflections on the Reading of Statutes by Mr. Justice Frankfurter (Cardozo lecture of March 18, 1947), Vol. 2 The Record of the Association of the Bar of the City of New York, p. 229.

37 H. R. 1639; 80th Congress.
H. R. 242 and H. R. 6345; 79th Congress.

38 See testimony before Subcommittee #4 of the House Committee on the Judiciary on H. R. 1639 given on March 28, April 1, 14 and 18, 1947 (compare testimony of J. Carter Fort, Vice Pres. and General Counsel of the Association of American Railroads, and John W. Freels, General Attorney of the Illinois Central Railroad, on the one hand, with Harry See, National legislative representative of the Brotherhood of Railroad Trainmen, Warren H. Atherton, Esq., special counsel, Brotherhood of Railroad Trainmen, A. E. Lyon, Executive Secretary, Railway Labor Executives Assn., Jonas A. McBride, Vice President and national legis

The House of Representatives just did barely pass[39] the Jennings Bill on July 17, 1947 *ten days after it had passed the revision containing Section 1404(a) without debate;* the debate on the floor of the House on the Jennings Bill consumes some 15 pages of the Congressional Record[40] but not one word was said to indicate that the

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lative representative, Brotherhood of Locomotive Firemen & Enginemen, and W. D. Johnson, vice president and national legislative representative, Order of Railway Conductors of America, on the other; Some 16 labor groups expressed opposition. 37 Bar Associations expressed views but *not* on the form in which the House passed the bill; as indicated there were three bills in the House and H. R. 1639 was amended before passage; at least 3 articles appeared in the American Bar Association Journal alone, viz: *Bill to Curb "Shopping" for Forums Is Urged,* Gay 33 A. B. A. J. 659; *Substitute for Jennings Bill Is Urged,* Devitt 34 A. B. A. J. 454; *Statement* by Frederick W. Brune, 34 A. B. A. J. 457 (June 1948). Oddly, Mr. Devitt urged that since "H. R. 1639 would patently discriminate against the Rail Worker, a substitute which would effectuate the operation of the doctrine of *Forum Non Conveniens* should be considered." Mr. Brune, who as chairman of the American Bar Association's Committee on Jurisprudence and Law Reform wrote in defense of H. R. 1639 as passed, said: "Perhaps the strongest objection to placing the matter of venue in FELA cases in exactly the same position as venue in ordinary civil cases is the one pointed out by Mr. Justice Jackson in his concurring opinion in *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698, where he spoke of the possibility that an injured railroad worker might be forced to 'try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere'. A similar possibility would exist in any case in which a motion to dismiss on the ground of *forum non conveniens* had to be fought out as a preliminary to a trial on the merits."

39 The Roll Call vote was

Yeas	—	203
Nays	—	188
Present	—	1
Not Voting	—	38

93 Cong. Rec. 9193.

40 93 Cong. Record 9178-9193. During the debate the "Devitt Amendment" proposing that choice of venue in FELA cases be made subject to the doctrine of "Forum Non Conveniens" was argued on the floor of the House and defeated.
The railroads and bar associations urged restrictions in venue choice to prevent "abuses" by a small group of the bar. The testimony before

House had just ten days prior thereto passed the revision containing Section 1404(a).

Two observations are manifestly irrebutable:

1. When Congress passed the revision in reliance on the representations that what changes there were in the venue provisions of the Judicial Code, were of a "minor" and "non-controversial" nature, it could not have had in mind the venue provisions of the Federal Employers' Liability Act.

2. If Congress had actually intended to affect the venue provision of the Federal Employers' Liability Act in the Judicial Code, at least one Congressman could have been expected to observe that the lengthy and stormy debate on the Jennings Bill was unnecessary in view of the passage of the revision ten days earlier.

While the Senate failed to pass the Jennings Bill and did pass the Revision, it is the record in the House, paradoxically, which more clearly establishes the legislative intent not to affect Federal Employers' Liability Act venue by Section 1404(a).

When viewed in broad perspective, there is an implicit finding in the decision of the District Judge of a Congressional intent to reverse the entire current of legislative enactment and judicial interpretation thereof by the Supreme Court. For 41 years, without a single backward step, what legislative changes there have been in the Fed-

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the Subcommittee disclosed however that during the 5 years 1941-45 when there were a total of 211,057 casualties including 4943 deaths, the number of cases alleged by the railroads to reflect objectionable practices was 2500. The instant litigation was cited by the railroads as objectionable because of the distance involved in the choice of venue (House hearings on H. R. 1639, pp. 119, 121).

eral Employers' Liability Act have each tended to liberalize the rights and remedies of the injured workman.[41]

Congress had consistently manifested in the past a recognition of the burdens, obstacles and disadvantages which have beset the injured railroad worker in his efforts to obtain his one dollar out of every two dollars of judgment under the "backward system" of compensating for industrial accidents in this exceedingly hazardous occupation. The modern and liberal trend of legislative enactments by Congress were at least limited responses to the perception that the railroad and the injured worker do not come before the judicial tribunal with equal opportunity.[42] The development of the Federal Employers' Liability Act was contemporary with the enactment by practically every State in the Union of Workmen's Compensation Laws, which imposed liability without fault on employers.

There was a total absence of *indicia* that Congress intended a reversal of its long and well established benevolent policy toward injured railroad workers. Such intent cannot be lightly presumed, as was manifestly done by the District Judge.

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41 Amendment to Section 51 of August 11, 1939, Chapter 685, Section 1, 53 Stat. 1404, broadened the definition of an employee.

Amendment to Section 54 of August 11, 1939, C. 685, Section 1, 53 Stat. 1404, eliminated assumption of risk as a defense to actions based on negligence.

The Statute of Limitations, as set forth in Section 56, was changed from 2 to 3 years by the Act of August 11, 1939, Paragraph 2 thereof.

Section 60 was added on the same date, establishing a penalty for suppression of information relating to industrial accidents by the carriers.

42 The injured employee has the burden of proving negligence and of producing evidence, frequently unobtainable and in the hands of the railroads who own and control the premises and equipment involved. The witnesses are under the control and general supervision of the railroad in most instances. The railroad is enabled to make an early and thorough investigation of the occurrence, etc.

POINT V

The granting of invulnerable venue rights under Section 6 of the Federal Employers' Liability Act was a meaningful and purposeful exercise of legislative prerogative by Congress. It could only be taken away by an equally specific discharge of the legislative function. The generalities in a revision do not accomplish that purpose. The District Judge lacked the power to make an order transferring this action out of the Southern District of New York and should be directed to nullify it.

Dated: January 13, 1949.

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